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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS' COMMITTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE OHIO OIL COMPANY ET AL., APPELLEES.

This civil action brought in the District Court of the United States for the Western District of Louisiana under the provisions of paragraph 4 of the Sherman Act *(15 U. S. C. §4)* to restrain alleged violations of paragraphs 1 and 2 of that statute was dismissed in the Trial Court pursuant to the provisions of Rules 37 and 41 (b) of the Rules of Civil Procedure upon the refusal of plaintiff to comply with an order of the court. From the order for dismissal plaintiff prosecutes this appeal under the provisions of *15 U. S. C. § 29.*

STATEMENT OF CASE

All questions which may be presented upon this appeal arise in consequence of orders rendered in connection with a motion originally made by the defendant, The Ohio Oil Company, (upon a showing of "good cause" therefor) to require plaintiff to produce for inspection, etc. (Rule 34) certain documents and letters then in the possession and under the control of the Attorney General and the response of the government to those orders.

For ready reference we quote the motion referred to[1] which appears at page 33 of the Record herein:

> "Defendant The Ohio Oil Company moves the Court for an order requiring plaintiff to produce and permit defendant to inspect and copy:
>
> 1. All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action relating to:
>
> (a) The methods of operations conducted by this defendant alone or in association with the other defendants herein (or any number thereof) in or in connection with the production, processing, and marketing of liquid and gaseous hydrocarbons produced from the

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1. For supporting affidavit showing "good cause" see Record, page 34, et seq.

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Cotton Valley Field in Webster Parish, Louisiana;

(b) The methods of operations conducted by this defendant alone or in association with the other defendants herein (or any number thereof) through or under the supervision of Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish;

(c) The functions performed by the Cotton Valley Operators Committee in or in connection with the production, processing and marketing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field in Webster Parish.

2. All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) relating to methods of operations conducted by this defendant or any other defendant herein, alone or in association with other defendants (or any number thereof) in or in connection with the production, processing and manufacturing of liquid and gaseous hydrocarbons produced from the Cotton Valley Field of Webster Parish.

"Plaintiff has (through the Attorney General of the United States, under whose direction,

supervision and control this action is maintained) the possession and custody of each of the documents mentioned, which contain evidence relating to matters within the scope of the examination permitted by Rule 26 (b), as more fully shown by the affidavit attached hereto."

Just what occurred in the Trial Court which lead to the order for dismissal is clearly and concisely stated in that judgment and order (R 218, et seq.), from which we quote the following:

"On November 7, 1947, the Ohio Oil Company, one of the defendants in this case, filed a motion to require plaintiff to produce for inspection, certain documents, including reports of the Federal Bureau of Investigation, correspondence, etc., with various persons, all as stated in said motion, which is made part hereof. Similar motions were filed by the other defendants. * * *

" * * * Subsequently, the matter was, on February 21, 1949, reset for hearing on March 11, 1949, at which time, having heard further arguments, it was ordered that the Government produce the documents requested by The Ohio Oil Company 'with the right to submit to the Court for ruling any documents they desired to claim to be privileged.'

"On May 10, 1949, plaintiff filed a motion to vacate said order of March 11, 1949, and on June 15, following, it was heard and defendants declined to accept the Government's offer of partial compliance by filing an abstract of factual information contained in the reports of the Federal Bureau of Investigation, and the Court indictaed its purpose

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to adhere to the ruling requiring the Government to produce the documents. At this time counsel for the Government requested time to contact the Attorney General, before the Court finally ruled on the said motion to vacate, which was granted, and on the following day, June 16, 1949, when the hearing was resumed and the Court denied the said motion to vacate, counsel for the Government was given additional time to consult with the Attorney General as to whether the Court's order to produce would be complied with, and the question of what was to be done in case of refusal was reset for July 7, 1949.

"On the last mentioned date, counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the Court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the Court announced that the

only course left was to dismiss the complaint for failure to comply with its orders."

POINT IN ISSUE

The Record in this cause discloses beyond per adventure that there is one and only one question presented upon this appeal and that concerns the right (vel non) of the Attorney General to withdraw any and all documents and materials contained in the files of his office beyond the reach of discovery in an action in which the government is plaintiff upon his simple declaration or fiat that the papers sought to be obtained (regardless of their nature) must be regarded by the Court as privileged.

The precise position assumed by the government with regard to the authority of the District Court in respect to the orders mentioned is set forth in the affidavit attached to its "motion to vacate" (R 162), from which we quote the following:

"Tom C. Clark, being duly sworn, deposes and says:

1. That he is the Attorney General of the United States, and has his office and place of residence in Washington, D. C.;

2. That he has been informed by his assistants in the Antitrust Division of the Department of Justice that this Court entered an order in the above entitled action on March 11, 1949, requiring the production for examination and inspection by the Court of certain reports made by agents of the Federal Bureau of Investigation to the Attorney General relating to the subject matter of the above

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entitled action, in the course of their investigation of this case;

3. That the inspection by the Court of the said reports is for the purpose of affording the Court an opportunity to determine whether a claim of privilege by the Attorney General is well taken or whether, in the opinion of the Court, the reports should be made available to the defendants for inspection and copying;

4. That for the reasons hereinafter set forth deponent has instructed his assistants in the Antitrust Division to move the Court to vacate the said order and deny the Motion to Produce;

* * *

6. That as Chief Executive of the Department of Justice, your deponent respectfully suggests to the Court that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged; that this prerogative derives from the Constitution of the United States and is in no way affected or changed by the Rules of Civil Procedure Relating to Discovery, particularly Rule 34; that under the authority of R. S. 161 (5 U. S. C. A. 22) (a copy of which is attached hereto and made a part hereof as Exhibit A) the heads of the Executive Departments of the Government are authorized to determine which documents of their departments are to be considered confidential and not subject to disclosure."

As already shown the motion to produce was allowed "with the right" (reserved to plaintiff) "to submit to the Court for ruling any documents they desired to

claim to be privileged" and solely and only upon the condition "that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded." But the government being unwilling to submit the question of privilege in respect to any particular documents or reports for decision of that question by the Court refrained from filing any request for protective orders (with regard to particular matters) as permitted by Rule 30 (b) and stood solely and absolutely upon its position (as set forth in the motion to vacate) "that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged."

THE QUESTION OF THE ADEQUACY OF THE SHOWING OF GOOD CAUSE FOR PRODUCTION MADE IN THE TRIAL COURT WAS NOT RAISED THERE AND CANNOT BE INJECTED AS AN ISSUE ON APPEAL.

It seems that the government would now like to assert (for the first time) upon appeal that the showing of good cause which accompanied The Ohio Oil Company's motion to produce was somehow insufficient or inadequate in substance.

Assignment No. 6 of the assignment of errors is:

"The court erred in granting defendants'

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motion for the production of aforesaid documents in that they were not designated, nor was good cause shown, as required by Rule 34, Federal Rules of Civil Procedure."

(R 223)

But nevertheless a careful search of the entire Record fails to reveal that the government at any time made any objection based upon either point referred to. The sole and only objection made to any order connected with the motion was set forth in the so-called "motion to vacate" (quoted above) which directly and unmistakably sets forth that the single contention of the government (which was asserted throughout as an absolute obstacle to any discovery regardless of the form employed or reason therefor) was "that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged."

The objection was precise and specific and when an objection is so made it is to be confined on appeal to the objection expressly stated.[2]

Although the present Rules of Civil Procedure (Rule 46) dispense with any necessity of formal exceptions to rulings or orders of the court, it is expressly provided that "for all purposes for which an exception has heretofore been necessary it is sufficient that a party, *at the time the ruling or order of the court is made* or sought,

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2. See *Howard Stebbins v. Maria L. Duncan*, 108 U. S. 32; 27 L. ed. 641 and also *Johnston v. Reily*, 160, F. (2d) 249.

makes known to the court the action which he desires the court to take or *his objection to the action of the court* and *his grounds therefor.*" (Emphasis Ours)

The requirement that objection be made at the time of ruling and that the court then be informed of the grounds therefor is merely in recognition of the established practice which prevents one from urging on appeal that any ruling was made in error when the objection thereto was not so called to the attention of the Trial Court.[3]

> "* * This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * *"
>
> *United States of America*
> *v. Ray Keith Atkinson;*
> *297 U. S. 157.*

> "* * Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."
>
> *Pennsylvania Railroad Company*
> *v. James H. Minds; 250 U. S. 368.*

> "* * The reason for the rule is the broad one that a defect found lurking in the record on

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3. For application of rule in respect to a pre-trial order, see *Fowler v. Crown-Zellerbach Corporation;* 163 F. (2d) 773.

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appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court."

George W. McCandless v. Maxime H. Furlaud; 293 U. S. 67.

"An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, * *."

Missouri Pacific Railway Company v. Mary Fitzgerald; 160 U. S. 556.

In this case the moving party did make a showing of cause for the production of documents which accompanied that motion, and the Record reveals that the government either conceded the showing to be sufficient or otherwise then, deeming its contention with respect to the asserted prerogative of the Attorney General to be conclusive, elected to rely upon and to present that single question. We shall later refer to statements made in the government brief in connection with the dissertation relating to showing good cause and have referred to the matter at this point only to show that the question was not raised or passed upon in the court below and for that reason cannot be considered on this appeal.

In this same connection there is some reference in the government brief to the fact that there was an offer to furnish defendants with partial excerpts selected from certain papers and documents among those in the files of the Department of Justice, the contents of which (to

that extent) the Attorney General was willing to divulge. — Yet even this ersatz offer was made upon the condition that the Attorney General remain the final arbiter of what was to be supplied and the manner in which it would be furnished — *even for the Court's inspection.*

The so-called alternative offer was in fact an ultimatum that defendants accept what information the government was willing to supply in the manner tendered or go entirely without. The statement made (by counsel) to the Court was:

> "Since I was here before I have gone into these records very thoroughly, and I have made a summary and analysis covering parts and portions of the record that I made from the originals themselves, and I think that is the practical manner to handle it, and you will be able to go through it much faster because I refer to it by paragraph and page, and discuss it in my analysis. These exhibits you can read, and they will assist you in determining whether or not the defendant should be entitled to the official records themselves. I offer that to the Court, but I cannot, and I have not been authorized by the Attorney General, but, on the contrary, have been ordered by him to refuse to surrender the official reports themselves, even though, I frankly state to your Honor, I have them in my possession here.
>
> "The Court: Well, the situation is that I am confronted with the problem of determining whether I shall order these records produced and given to the defendant, or whether the Attorney General shall decide the matter. That is what I am confronted with.

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"Mr. Britt: That is it exactly."
(R 216)

The allowance of an order for the production of papers and documents and the manner in which any such order is to be complied with are matters within the discretion of the Trial Court (Rule 30 (b)[4] , but in this instance there was no appeal to the discretion of the Court because the nature of the offer was to remain fixed and determined (absolutely) by the decision of the Attorney General.

Matters within the discretion of a Trial Court are seldom reviewable on appeal, and we can imagine no instance in which a matter within the discretion of the Trial Judge will be considered on appeal in the absence of any request or opportunity for the exercise of discretion in respect thereto.

In this case no objection was made to the failure of the Trial Judge to rule in any manner in respect to the so-called alternative offer because he was not asked to do so, and the matter was not again mentioned until the reference appearing in the brief herein. There is no objection in the Record or assignment of error relating thereto and the matter is not properly before the Court in any sense.

ASSIGNMENT OF ERRORS

(R 222)

The errors assigned (other than assignment

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4. See *Hickman v. Taylor*, 329 U. S. 495; 91 L. ed. 451.

No. 6 referred to above as not properly before the Court) are set forth in substance[5] in assignments Nos. 1 and 2 as follows:

> "1. The court erred in dismissing the complaint for the failure of plaintiff to produce for inspection reports of the Federal Bureau of Investigation during the period from February 1, 1946 to June 17, 1947 and all correspondence of the Department of Justice during the period from August 1, 1945 to June 17, 1947, relating to the subject matter of this action.
>
> "2. The court erred in granting defendants' motion for the production of the aforesaid documents, as more particularly set forth in said motion, notwithstanding the affidavits of the Attorney General that these documents are privileged and confidential in the public interest."

Attention is directed to the fact that the assignments made by appellant include no assertion that it was error to dismiss the complaint because of the refusal of plaintiff to submit the documents sought to be obtained to the Court for determination of the question of right to claim privilege in respect thereto. Assignment No. 1 is the only assignment in which the dismissal of the action is mentioned and that assignment presents no such contention. We, consequently, conclude that the government concedes that there was no error in the order for

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5. Assignments Nos. 3 and 4 merely divide the import of assignment No. 2 to cause the same to apply separately to the F.B.I. reports sought and then to letters, telegrams, etc., and assignment No. 5 merely recites the asserted legal sources of the position assumed in that assignment.

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dismissal if the matter of privilege is properly to be determined by the Court.[6]

The same idea is emphasized by assignment No. 2 in which there is no reference to the protective qualifications of the order actually rendered (which is totally ignored throughout the entire assignment), and again the order to produce is treated as though it were not restricted to those documents (only) with regard to which "the production of any part thereof" would not be injurious to public interest.

It remains that the sole contention made by appellant upon this appeal is that in each and every instance and under all circumstances "it is exclusively within the the exercise of the judgment of the Attorney General" to determine whether or not any paper or document contained in the files of the Department of Justice is to be regarded as "privileged" within the meaning of Rule 34, and as such not subject to discovery. In other words, that no paper or document known to exist in the files of the Department of Justice may be reached through any process of discovery should the Attorney General choose merely to assert (regardless of cause) that the same is "privileged."

The statement of points to be relied upon in this case merely adopts the points contained in the as-

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[6] Apparently the position is that since (as contended) the question of privilege is to be determined exclusively by the Attorney General, the protective qualifications attached to the order to produce as rendered in this case were without effect and that the order remained as though no qualifications had been attached thereto.

signment of errors, and the Court will consider nothing but the points of law so stated.[7]

SUMMARY OF ARGUMENT

The appellees, on whose behalf this brief is filed, contend in substance:

That in an action brought by the government to restrain alleged violations of the Sherman Act, the government is given the option either to reveal all evidence not properly privileged upon adequate ground of public policy (within its control) which bears upon the charges made, or to let the offense go unrestrained;

That it is as much or more in the public interest that justice be done toward persons accused of violating our Antitrust statutes as it is to preserve secrecy in respect to the housekeeping records of the government;

That the propriety of introducing any paper into a case as testimony or as a means of discovery in any case in which the government is the complainant must depend on the character of the paper and not on the character of the person who holds it;

That it has been the policy of our Courts to treat the government when appearing as a litigant like any private individual;

That both principle and policy demand that

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7. Rule 13 of the rules of this Court.

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the determination of the question of privilege in respect to any paper or document within government control shall be for the Court; and

The government, through the Attorney General, should not be heard to complain of an order directing the production of documents contained in the files of the Department of Justice to permit the Court to determine whether in the best public interest information therein should be disclosed when the regulations of that Department expressly provide for such inspection.

ARGUMENT

Several years before the effective date of the new rules Mr. Justice Cardozo made this observation:

> "The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role."[8]

THE RULES OF CIVIL PROCEDURE EXCEPT WHERE SPECIFIC EXCEPTION IS MADE APPLY TO THE GOVERNMENT OF THE UNITED STATES AS THOUGH IT WERE ANY OTHER LITIGANT.

With regard to the intent of those who drafted the present federal discovery rules, Judge Charles Clark has stated:

> "***It was our theory except as we made

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8. Sinclair Refining Company v. Jenkins Petroleum Process Company 289 U. S. 689; 77 L. Ed. 1449.

special provisions these rules apply to the United States as a litigant as much as to anyone else."[9]

It has been authoritatively stated that "it ought to be unnecessary to say" that the Rules of Civil Procedure apply to appeals by the government as well as to those by other litigants and that there is no exception even in an antitrust case.

United States of America v. Yellow Cab Company Decision of December 5, 1949, 94 L. Ed. (Adv. Sheet No. 3) page 123.

It consequently seems that it must follow that those rules which expressly "govern the procedure in the United States District Courts in all suits of a civil nature"[10] apply in all actions brought by the government in all respects thereof, including the provisions relating to discovery, and it has been so held as to antitrust actions.[11]

"That it was not intended to exempt the United States from the operation of Rule 33 is conclusively shown, it seems to me, by the provisions of Rule 37. * * In paragraph (f) of the said Rule 37, it is provided that expenses and attorneys fees are not to be imposed on the United States under

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9. American Bar Association, Proceedings of the Federal Rules Institute at Washington, D. C. p. 49. Attorney General William D. Mitchell spoke to the same effect, *ibid.* p. 333.

10. Rule 1.

11. For similar decisions in other type cases see *Bowles v. Ackermen*, 4 *F. R. D.* 260, 262 (*S.D.N.Y.* 1945; *Flemming v. Bernardi*, 4 F. R. D. 270, 271 (*N.D. Ohio*, 1941); *United States v. American Solvents & Chemical Corp. of California*, 30 *F. Supp.* 107 (*D.C. Del.*, 1939); *Brewer v. Hassett*, 2 *F. R. D.* 222 (*D.C. Mass.*, 1942); and *Walling v. Richmond Screw Anchor Company* (*E.D.N.Y.*, 1943) 7 *F. R. S. pg.* 587.

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this rule. If Rule 33 is not applicable to the United States paragraph (f) would have been omitted, or it would have been expressly stated that the United States was not subject to Rule 33.

"And that the rules generally apply to the United States is shown by the provision of Rule 12 extending the time within which the United States may plead."

United States v. General Motors Corporation; 2 F. R. D. 528 (530).

To the same effect see article by Pike and Fischer, *56 Harvard L. R., page 1125*, in which it is observed that "the provision of appropriate trial-preparation procedural steps for all litigants seems well within the authority of the Supreme Court under the enabling act,[12] regardless of the former practice."

Policy supports the same view.

"It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions."

Bank Line v. United States 163 F. (2d) 133 (138).

It would also seem in principle that when the government or any agency or department thereof resorts to the courts to obtain judicial relief it must submit to the

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12. 28 U.S.C. 723 b and 723 c. See *Sibbach v. Wilson & Company, Inc.*, 312 U. S. pg. 1.

same rules which govern its adversaries. It must as stated by Lord Brougham with reference to a foreign sovereign "be content with the common fare of the Court."

King of Spain vs. Hullett
7 Bligh N. S. 359 (1833).[13]

Among the numerous decisions relating to the question of governmental privilege with which we are concerned, we have found none in which the government has successfully contended that it was not generally subject to the provisions of the rules relating to discovery, and no such contention has been suggested in this proceeding. It follows that the government was compelled to make disclosure of all papers and documents described in the motion to produce filed herein if "not privileged" within the meaning of Rule 34 or suffer the consequences.

ALL CLAIMS TO GOVERNMENTAL PRIVILEGE WHICH MAY BE ASSERTED IN ACTIONS TO WHICH THE GOVERNMENT IS A PARTY DEPEND UPON PUBLIC POLICY WHICH ALSO REQUIRES A FULL AND FAIR DISCLOSURE OF ALL EVIDENCE RELEVANT TO THE ISSUES IN DISPUTE.

In the case of *Bank Line v. United States* (libel by Bank Line, Limited, wherein the United States filed a cross-libel) application was made for relief author-

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13. Compare: *Guaranty Trust Company of New York v. United States of America*, 304 U. S. 126;
United States v. The Thekla, 266 U. S. 328, 340, 341;
United States v. Stinson, 197 U. S., 200, 205.

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ized by the admiralty rules because of the failure of the United States to comply with the order of the District Court to submit for inspection and copying certain records of a naval inquiry at Casablanca. The government disclaimed any considerations of military security as a reason for its unwillingness to disclose, but maintained that the publicity which would result from the order would greatly hamper and impede orderly administration.

In considering the government's contention in the case (reported in *76 F. Supp. 801)*, Judge Rifkind said:

> "It seems to me that two public interests are here in conflict. The first is that justice shall be done between litigants. The conflicting interest is that asserted by the government in the secrecy of its housekeeping records. That the latter public interest exists the courts are not privileged to question. Which policy is to prevail?"

To the same effect see article styled: *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments; Vol. 3, Vanderbilt Law Review, pg. 73.*

These interests referred to by Judge Rifkind as conflicting are analyzed and evaluated by Dean Wigmore in the following language:

> "It is urged, to be sure (as in Beatson v. Skene), that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As

if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity,' as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst of causes.'

"What is the necessity for secrecy in such matters? To justify a privilege, it must be, on settled principles (ante, §§ 2192, 2285), a secrecy indispensable to induce freedom of official communication or efficacy in the transaction of official business, and it must further be a secrecy which has remained and would have remained inviolable but for this compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion."

Wigmore on Evidence
3rd Ed., Vol. 8. §2378a, pg. 790.

We also find in our early history when the liberties guaranteed by the Constitution were uppermost

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in the minds of most that Chief Justice Marshall (in the Burr trials as reported by Brunner) most vividly expressed the public interest in the administration of justice.

> " * * It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defense, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."

The Chief Justice then continued:

> " * * The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited.",

and with regard to the letter first mentioned it was said:

> " * * There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena."

25 Fed. Cas. page 37

In order that the public interest in favor of a full and fair disclosure of all evidence relevant to issues in dispute may be subordinated to the public interest in favor of the nondisclosure of State Secrets, it must be made to appear that the latter interest relates to matters which are actually confidential and of a character, the disclosure of which would be injurious to the nation. In discussing this subject in *Walling v. Richmond Screw Anchor Company (7 F. R. S., pg. 587)*, Judge Moscowitz said:

> "This Court refuses to go so far as to decide that any and all records of a governmental agency are of a confidential nature and therefore privileged. It may very well be that in a proper case the Court would direct a governmental agency to disclose a record in its possession. The record must

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really be of a confidential nature, it cannot be merely thought to be such. The claim that it is of a confidential character cannot be based on whim or caprice. The Court is not bound by the claim of privilege unless in fact the records are of a confidential nature or might prove prejudicial to the Government or to the public interest. Then and then only are they privileged."

As stated by Chief Justice Marshall "The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it." *(25 Fed. Cas. page 34.)*

There is no information which could have been obtained by the Department of Justice with regard to the operations conducted at Cotton Valley by the defendants in this case which might be regarded in the light of State Secrets. The project conducted there was one of the very first in the conservation of natural gas and liquid hydrocarbons recoverable therefrom through the recycling of residue gas, and as such was widely publicized from its very beginning. Since the institution of this action its economic and legal phases have been popular subjects for innumerable articles and pamphlets, and the defendants herein (the operators) have been left with the same secrecy or privacy as to the operations conducted as a parlor goldfish. This indubitably is a case of housekeeping only in which there is no public interest in nondisclosure of facts so generally and well known both at home and abroad.

It may be that the two factors of public in-

terest mentioned must be weighed one against the other in each instance wherein claim to privilege is asserted by governmental agency, but certainly there exists no general privilege in favor of the nondisclosure of housekeeping information reflected by papers and documents in departmental files which is paramount to the public interest in the fair and full disclosure of all relevant evidence in the administration of justice in enforcement of governmental regulations.

THE PRINCIPLE OF PRIVILEGE OF NONDISCLOSURE CANNOT BE AVAILED OF BY THE GOVERNMENT IN AN ACTION TO WHICH THE GOVERNMENT IS A PARTY IN INTEREST.

Boske v. Comingore, 177 U. S. 459, 44 L. Ed. 846 and Ex parte *Sackett, 74 F. (2d) 922* are cited most frequently in support of the proposition that assertion of executive privilege must be sustained by the courts. Both cases referred to involved litigation in which the United States was not a party, and we shall not deny the application of the rule of privilege announced in those cases (irrelevant herein) even though the rationale of such decisions has been subjected to impressive criticism[14]. The rule, however, is very different in actions to which the government is a party.

Where disclosure of information in the possession or under the control of a governmental agency is prohibited and a privilege in created (either under specific

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14. Wigmore on Evidence § 2378a, pg. 795.

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federal statutes or under departmental rules promulgated pursuant to 5 U. S. C. A., §22, 2 F. C. A. Title 5, §22) the principle of privilege of nondisclosure cannot be availed of by the government or by its public employees where disclosure is sought in an action in which the government is an actual party in interest.

See Note: *165 A. L. R. 1338, et seq.*

Also: *United States vs General Motors Corporation, 2 F. R. D. 528.*

Bowles vs Ackerman, 4 F. R. D. 260.

United States vs Watkins, 67 F. S. 556.

Fleming vs Bernardi, 4 F. R. D. 270.

Kentucky-Tennessee Light & Power Company vs Nashville Coal Company, 55 F. S. 65.

Walling v. Richmond Screw Anchor Company, 4 F. R. D. 265.

Brewer v. Hassett, 2 F. R. D. 222.

"While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality

they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively."

United States vs Andolschek,
142 F. (2d) 503 (506).

In the Bank Line case *(76 F. S. 801)* Judge Rifkind, after pointing out that in criminal cases the government is given the option either to reveal all evidence within its control which bears upon the charges made or to let the offense go unpunished and noting that the same rule had been recognized in other types of proceedings, then stated that it was but a short and necessary step to apply the rule in a civil action.

"It seems to me but a short step, and a necessary one, from these premises to the argument that where the government is the complainant in a civil suit for damages it should likewise be required to make its own choice — to resolve on its part which of two conflicting public interests it prefers in any particular instance." (Pg. 803)

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In an earlier decision in a habeas corpus proceeding *(United States v. Watkins, 67 F. Supp. 556)*, Judge Rifkind stated his impression of the theory of waiver as follows:

> " * * Moreover, the theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy. That public policy is that a person should not be deprived of his liberty without giving him an opportunity to have access to material which might exculpate him." (Pg. 561)

The term liberty as used in the statement quoted was undoubtedly intended to extend to all liberties guaranteed by the Constitution without restriction and to include the civil liberties of freedom in commercial and industrial effort and the enjoyment of the ownership of property.

Underlying the rule of waiver of privilege in all actions brought by the government is the general principle that public policy forbids the maintenance of any suit which would inevitably lead to the disclosure of matters which the law regards as confidential. An example of the application of this principle appears in *Totten v. United States, 92 U. S. 105, 23 L. Ed. 605* in which the claims of plaintiff for compensation for espionage services rendered during the Civil War under agreement with President Lincoln were denied for reasons stated as follows:

> "It may be stated, as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife or of communication by a client to his counsel for professional advise, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the Government, as the existence of a contract of that kind is itself a fact not to be disclosed."

It consequently follows that when the government brings an action in the enforcement of its laws and regulations, it must necessarily have determined to abandon all secrecy and claims to privilege on that account with regard all matters involved in such action and relevant thereto, since a continued claim that the matters involved were State Secrets and privileged from disclosure as such would defeat the action.

Pursuing the idea of waiver of privilege further in the Bank Line case (last referred to) in its application in cases in which the government is defendant, Judge Rifkind said:

> "It is a somewhat longer step to the conclusion that the privilege is surrendered when the government is a party defendant. The government cannot be made a party defendant without

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its consent; and I assume that the government could have annexed to its consent an absolute privilege of non-disclosure of information in its possession. To the extent that it would have made the assertion of some claims against the government futile, it would amount to a constriction of the scope of the government's consent.

"Congress has not here so circumscribed its consent to be sued. 46 U. S. C. A. §§ 741, 742, 743, 781, 782. On the contrary, § 743 directs that the principles of law and the rules of practice obtaining between private parties shall prevail. The consent, being general, amounts to an endorsement of the libel with the sovereign's command 'Soit droit fait al partie'. (Let right be done to the party). But right cannot be done if the government is allowed to suppress the facts in its possession."

Bank Line v. United States
76 F. Supp. 801 (804).

It is very interesting to note (as pointed out by Judge Rifkind) that the Admiralty Act expressly provides (§ 743) that suits under the statute shall be heard according to the rules of practice obtaining in like cases between private parties, and further that the provisions of the Federal Tort Claims Act *(28 U. S. C. § 2671, et seq.)* seem to imply the same intention.

In the enactment of these statutes authorizing actions against the government, Congress might have imposed any conditions which it saw fit in respect to the maintenance of the actions authorized, and the fact that no conditions were imposed to place the government in a favored or preferential position with regard to procedure

in such cases clearly indicates that it was the opinion that as a matter of policy the government as a party litigant should appear in all proceedings maintained in the District Courts of the United States[15] (whether as plaintiff or defendant) upon the same terms as its adversaries.

A CIVIL ACTION TO RESTRAIN ALLEGED VIOLATIONS OF THE SHERMAN ACT IS AT LEAST A QUASI CRIMINAL ACTION IN WHICH THE THEORY OF WAIVER OF PRIVILEGE SHOULD HAVE PARTICULAR APPLICATION.

There is no doubt that punishment by fine may be imposed for violation of the Sherman Act only in a criminal action (see *United States v. National Lead Company, 332 U. S. 319)*, but nevertheless there must be a factual showing of illegality to warrant injunction in a civil proceeding. See *Appalachian Coals, Inc. v. United States of America, 288 U. S. 344.* In either instance the enforcement of a criminal statute is involved and the civil action is at least quasi criminal in character. This idea was most aptly expressed by Mr. Justice Holmes in his dissent in *Northern Securities Co. v. United States, 193 U. S. 197*, which in that respect was not in conflict with the majority opinion of the Court:

> "The statute of which we have to find the meaning is a criminal statute. The two sections on

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15. Compare 28 U. S. C. § 272 relating to discovery in actions maintained in the Court of Claims providing as a special rule in actions pending in that Court that the head of any governmental department "may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest."

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which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction." (P. 401)

We further direct attention to the similarity of criminal or civil proceedings maintained in the enforcement of the statute which results from the provisions of Section 16 of the Act:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, this section shall not apply to consent judgments or decrees entered before any testimony has been taken."
>
> *15 U. S. C. § 16.*

In connection with the theory of waiver of governmental privilege, we direct attention to the fact that all matters of privilege and waiver of privilege are evidentiary and claims of governmental privilege (of the character involved here) are based entirely upon grounds of public policy which oppose the disclosure of Secrets of State which would be injurious to the welfare of the nation.

It, consequently, does not appear that the nature or form of an action to which the government is a party could be material in solving the question of privilege or waiver of privilege, since the nature of the public policy opposing disclosure must always be the same.

It may be contended (upon some basis of argument which we do not comprehend) that the rule of waiver of privilege as announced in the case of *United States vs. Andolschek, 142 F. (2d) 503* is to be restricted in its application to proceedings of a criminal nature, but the criminal and civil proceedings authorized by the Sherman Act are regulatory in nature and maintained in the enforcement of the statute. Since the question of violation of a criminal statute is involved in either event, the same rules in respect to governmental privilege and the waiver thereof should be applicable to the same extent in both forms of action.

QUESTION OF CONSTITUTIONAL STATUTORY AND RULES PROVISIONS.

The fifth assignment of errors in this case is that:

> "5. The court erred in granting defendants' motion for the production of aforesaid documents, as more particularly set forth in said motion, in that it encroached upon the executive's authority under the Constitution and violated Section 161 of the Revised Statutes as implemented by the Attorney General's order of May 2, 1939 made pursuant thereto."
>
> *Record pg. 223.*

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There is, however, no constitutional or statutory provisions which lends support to the contention that the determination of the question of privilege in this case is exclusively that of the Attorney General, and it seems that any claim to privilege in this case was waived by the government even under the rules adopted by the Department of Justice.

Mr. Chief Justice Taft (in Ex parte *Grossman, 267 U. S. 87)* pointed out quite plainly that the Constitution does not provide that the different branches of government be kept completely separate and independent of each other:

> "The Federal Constitution no where expressly declares that the three branches of the government shall be kept separate and independdent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate." (119)

The reason underlying the failure to provide a constitutional guaranty of complete separation of the

several branches of government was explained by Mr. Justice Frankfurter in his concurring opinion in *Pennekamp v. Florida (328 U. S. 331)* as follows:

"***No institution in a democracy, either governmental or private, can have absolute power[4]."

(NOTE 4: "That this indispensable condition for a free society was well known to the framers of the Constitution, is the theme of Mr. Justice Brandeis in his dissenting opinion, in Myers v. United States, 272 US 52, 240, at 293, 71 L ed 160, 175, 242, 47 S Ct. 21: 'The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.' And see Mr. Chief Justice Taft, in Ex parte Grossman, 267 US 87, 119-122, 69 L ed 527, 535, 536, 45 S Ct 332, 38 ALR 131.")

Revised Statutes, paragraph 161, seems to have been adopted in conformity to the scheme of incomplete separation of the authority of the different branches of government, since the head of each depatrment was authorized merely to make regulations "not inconsistent with law."[16] It is, consequently, held that regulations

16. "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. (R. S. §161.)" (5 U.S.C. §22).

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adopted pursuant to the provisions of the Revised Statutes do not preclude a court of the United States from ordering discovery of information and materials contained in departmental files when the government is a party to the litigation.

> "But the clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific executive department regulation a judicial question for ultimate decision by the court."
>
> *Zimmerman v. Poindexter*
> *74 F. S. 933 (935).*

See Also: *United States v. Schine Chain Theatres, 4 F. R. D. 108.*

United States v. General Motors Corporation, 2 F .R. D. 528.

In respect to the regulations relating to departmental records adopted by the Department of Justice, we find most interesting the very recent decision (February 24, 1950) rendered by the United States Court of Appeals for the Seventh Circuit in the suit styled *United States of America, ex rel. Touhy v. Joseph E. Ragen*, No. 9916 on the docket of that Court. That suit was a habeas corpus proceeding resulting from the fact that George R. McSwain, Special Agent in charge of the Chicago office of the Federal Bureau of Investigation, was punished for contempt upon his refusal to produce certain records of the F. B. I. pursuant to a subpoena issued in the course

of a criminal proceeding pending in a state court of Cook County, Illinois. In that case McSwain, acting under instructions from the Attorney General, declined to produce the material commanded by the subpoena of the state court, and as justification for such refusal relied upon Department of Justice Order No. 3229 (referred to herein) and *Supplement No. 2 of said order, dated June 6, 1947.* In the course of the opinion rendered, the court stated:

> "Admittedly, the government was not a party to the proceeding out of which the subpoena in the instant matter issued. Did it waive its privilege of non-disclosure in some other manner? This brings us to a consideration of Supplement No. 2 to Order No. 3229 promulgated by the Department of Justice June 6, 1947, directed to all United States Attorneys and entitled 'Procedure to be followed upon receiving a Subpoena Duces Tecum.' The letter of the Attorney General directed to U. S. Attorney Kerner, dated May 25, 1949, among other things stated:
>
> > 'It is the Department's position that it should decline to produce the records in question. It is desired, therefore, that you proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229. It is requested that you or one of your assistants be present at the hearing on May 31, 1949, in order to represent Special Agent McSwain.'
>
> "The directive so far as here material provides:
>
> > 'Therefore, the officer or employee should, unless directed to the contrary by The Attorney

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> General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.'

It provides further:

> 'It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files.'

"Immediately following that which we have just quoted is a statement which while somewhat confusing and ambiguous appears to amount to a contraction of the unlimited privilege otherwise possessed by the Department of Justice. The directive provides:[17]

> 'If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged.'

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17. The Courts of the United States take judicial notice of the rules and regulations of the executive departments of the government prescribed by authority of law. See *Anton Caha v. United States* 152 U. S. 211, 38 L. ed. 415.

> Certainly this language contemplates some circumstances when the material called for must be submitted 'to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.' The challenging question is, what are the circumstances under which submission must be made? It appears that the officer or employee is only required to do so 'if questioned'. We construe those words to mean that the material called for must be submitted to the court for the limited purpose stated if the person under subpoena is requested to do so. Conversely stated, it means that submission is not required in the absence of a request by the court or opposing counsel that it be made. And the directive to submit under the circumstances stated is to that extent a waiver by the Department of Justice of its non-production privilege."

In this case counsel for the government, who admitted that he had in his possession all information and documents involved, was questioned at length by the Court with regard to the attitude of the Department of Justice in respect thereto (R 205, et seq.), which colloquy may be said to have terminated by the following statement of counsel:

> "Mr. Britt: I am perfectly willing for the time to start now, if you Honor pleases. I have them here, and I still refuse to produce them."

Record, pg. 218

We submit that Supplement No. 2 of Order No. 3229 promulgated by the Department of Justice on June 6, 1947, is applicable here, and that under the cir-

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cumstances described, there was a complete waiver to any claim of non-production privilege even under the express terms of the order mentioned.

THE DETERMINATION OF THE QUESTION OF PRIVILEGE IN RESPECT TO ANY PAPER OR DOCUMENT WITHIN GOVERNMENTAL CONTROL IS FOR THE COURT.

In the case of *United States v. Klein, 13 Wall. 128, 20 L. ed. 519*, it was held that not even the legislative branch of government could prescribe rules of decision to the judicial department in cases pending before it, although attempted through act of Congress. With reference to the statute in question in that case, the Court said:

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?"

In *United States v. Radio Corporation of America 46 F. S. 654*, it was stated as a matter of principle based upon the authority cited therein that:

> "***It is fundamental to our form of government that in such suits,[18] as in all other matters brought before them for judicial action, the courts must act 'in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government.' Irvine v. Marshall, 61 U. S. 558, 567, 20 How. 558, 15 L. Ed. 994."

Vague reference has been made by the government in this proceeding to the decision rendered in *Marbury v. Madison (1 Cr. 137)* as though there might be something in the opinion in that case from which it might find solace. We submit, however, that it is implicit in that decision that the determination of all evidentiary questions of privilege (including such as that involved here) is for the Court and as a fair statement of that case, we quote here the synopsis thereof appearing in *Wigmore on Evidence, 3rd Ed., § 2378, Note 8, pg. 787:*

> "***Marbury v. Madison, 1 Cr. 137, 143 (mandamus to the Secretary of State to deliver commissions to justices of the peace; the commissions were alleged to have been duly made out and sealed, but unlawfully withheld; clerks of the department of State being summoned to prove the fact, they claimed a privilege not to disclose the transactions of the office, and the Attorney-General being summoned for the same purpose made the same claim; held that they must answer, the facts not being confidential; the Court said, 'they had no doubt he ought to answer; there was nothing confidential required to be disclosed. If there had been, he was not required to answer it . . . . But

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18. Antitrust actions.

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> the fact whether such commissions had been in the office or not could not be a confidential fact; it is a fact which all the world have a right to know'; * *."

We state that it appears from that decision that the determination of the question of privilege presented was regarded as a question for the Court because the Court did actually decide it. The Attorney General claimed privilege, but there was no contention that he had any right to determine that question which was treated strictly as a matter for the Court. In the trials of Aaron Burr (supra) the matter was treated in precisely the same fashion and from those precedents it seems that the highest authority in this country has at all times considered the determination of the question to be within the inherent function of the Court.

The opinion upon the subject generally is reflected by the following extracts from the authorities referred to:

> "There do not appear to be any federal cases discussing the manner in which the privilege may be claimed by the Government and determined by the court when the United States or an agency or officer thereof is a party. This much seems clear, however: inspection of government documents should be permitted, unless the court is satisfied that it would be against public policy to do so. Rules of Court in England (The Annual Practice (1938) O. 31, r. 19a (2) and in Australia (Robinson v. Australia (1931) W. N. 147, P. C.) authorize the court to inspect government documents in order to determine the validity of a claim of privilege.

And these rules of court apparently include a claim of privilege by a minister of state to the production of a document on the ground of public policy. Robinson v. Australia (1931) W. N. 147, P. C. In the report of that case there appears the following statement: 'The fact that production of the documents in the particular litigation would prejudice the Crown's own case did not justify any claim of privilege: see Esquimault and Nanaimo Railway Co. v. Wilson, (1920) A. C. 358, 366. Their Lordships agreed with the view of Griffith C. J. in Marconi's Wireless Telegraph Co. v. The Commonwealth, (1913) 16 C. L. R. 178, that the Court has always had in reserve the power to inquire into the nature of the document, and to require some indication of the nature of the injury to the State which would follow its production. At the time of Beatson v. Skeere, (1860) 5 H. & N. 838, any examination of the document would have had to be in public; that was the reason for accepting the Minister's word without making any examination."

Moore's Federal Practice
Vol. 2, § 34.05, pg. 2642.

"The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and

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this has been insisted upon by the highest judicial personages both in England and the United States: * *."

Wigmore on Evidence
3rd Ed., § 2379, pg. 799.

To the same effect see:

Bank Line v. United States
163 F. (2d) 133.

Crosby v. Pacific S. S. Lines
133 F. (2d) 470.

Walling v. Richmond Screw Anchor Company
7 F. R. S., pg. 587

Zimmerman v. Poindexter
74 F. S. 933.

O'Neill v. United States
79 F. S. 827.

Article by Pike and Fischer,
56 Harvard L. R., pg. 1125.

Article by William V. Sanford,
3 Vanderbilt L. R., pg. 73.

When the government through the head of any department thereof resorts to a court of the United States to obtain judicial relief, it must do so in accordance with the rules of law and practice prevailing in that Court, and it is the fundamental and inherent duty of the court to determine all questions of law and practice presented in the course of such proceeding, otherwise the inherent function of the court is abdicated.

CONCLUSION

The order rendered herein pursuant to defendants' motion to produce was rendered in precise conformity to the provisions of Rule 34 of the Rules of Civil Procedure with adequate provision for the protection of all designated papers and documents which might be deemed by the Court to be of a privileged nature. The order not only conforms precisely to the express provisions of the rule mentioned, but also conforms to the regulation of the Department of Justice dealing with the behavior of the officers and employees of that department as evidenced by Supplement No. 2 to Order No. 3229 issued on June 6, 1947.[19]

If the head of any department of government might, — by an arbitrary claim of privilege therefor — withdraw any and all information not actually of a privileged nature (existing in his possession) from the reach of discovery under the provisions of Rules 26 to 37, inclusive, of the Rules of Civil Procedure, then the government would in effect be no longer subject to the rules relating to discovery, since those rules could not be enforced without the consent of the head of the department. Supplement No. 2 to Order No. 3229 was undoubtedly an acknowledgment of that fact and an acquiescence in the inherent function of the courts of the United States to de-

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19. Understood to have been promulgated to avoid conflict with decisions such as those rendered in *United States v. Andolschek*, 142 F. (2d) 503 and *United States v. Krulewitch*, 145 F. (2d) 76.

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termine the question of privilege in all cases in which the government is a party in interest.

For the foregoing reasons, the order for dismissal should be affirmed.

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APPENDIX

APPELLANT'S ARGUMENTS WITH REGARD TO GOOD CAUSE, ETC.

Although we think it quite plain (as heretofore shown) that the question of the adequacy of the showing made in support of The Ohio Oil Company's motion for the production of documents (not raised in the Trial Court) is not before the Court on this appeal, we shall again briefly refer to that question to show that it obviously formed no part of and was unrelated to the government's sole and only contention.

The arguments advanced in appellant's brief might have been appropriate if they had been addressed to the Trial Judge, but are actually inconsistent with the position assumed in the Court below.

In connection with those arguments, we wish to point out that the statement of "the discovery proceedings in the Trial Court" as set forth at pages 8 and 9 of appellant's brief might misleadingly give the impression that the motion for the production of documents filed on behalf of The Ohio Oil Company[20] was filed after Magnolia Petroleum Company had been furnished with certain information[21] in response to interrogatories propounded by that Company. In fact (so far as we know) no party to the proceeding, other than Magnolia Petroleum Company, had any knowledge of the information contain-

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20. Filed October 25, 1947. R 33.

21. Furnished on May 13, 1949. R 165.

ed in the answers referred to until furnished with a printed copy of the Record herein.

Whatever arguments may be advanced in respect to the background which existed in the Court below, the Record and the findings of fact as set forth in the order for dismissal must control, and those findings of fact by the Trial Judge (and the Record) show beyond any doubt that no question of the inadequacy or insufficiency of the showing of cause for production was ever urged. Such a position would have been — and is now — inconsistent with the contention of executive control of the matter of privilege, since the former admits the existence of documents subject to discovery and the latter is in complete denial thereof. This inconsistency we believe fully explains why only the one contention was made in the Trial Court for at that time counsel had only the one contention in mind.

Any showing of cause for the production of documents presents a factual situation for determination in the discretion of the Trial Court[22] no different from any other matter within that discretion. Counsel for the government apparently argue that the remarks made in *Hickman v. Taylor* in respect to good cause for production of the documents and information sought under the extraordinary facts of that case should be the measure of a showing of cause in all cases, but certainly the nature of the showing must depend upon the facts and circumstances

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22. Hickman v. Taylor, 329 U. S. 495; 91 L. ed 451.

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of each particular case and in each instance the Trial Judge is to determine the sufficiency of the showing made.

As stated by Judge Kalodner:

> "What constitutes good cause is a difficult question. The elements are suggested in 2 Moore's Federal Practice, § 34.04. A liberal construction is, of course, desirable. United States v. Doudera, D. C. E. D. N. Y. 1939, 28 F. Supp. 223. Considerations of practical convenience are of importance. So also, the Court should be satisfied that production of the requested document is necessary to enable a party to prepare his case, or will facilitate proof or progress at the trial. These must be the considerations, at least, given prominence by the Court. In the long run, whether the order to produce a particular document will be granted is a matter for the exercise of the Court's discretion, and the attempted statement of a rule results only in diminishing the desired flexibility of the Civil Rules. See 2 Moore's Federal Practice, § 26.12 (as amended in the 1945 Cumulative Supplement, and see note 15 therein). It is sufficient guidance to keep in mind the liberal objectives of the Civil Rules."
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> *Gordon v. Pennsylvania R. Co., (E. D. Penn. 1946) 5 F. R. D. 510.*

In this case the Judge considered the showing made to be adequate, and in the absence of objection directed to the sufficiency of that showing in the Court below, the matter was then concluded.

We also wish to point out that the argument — that the documents which were sought were of a nature

subject to claim of privilege as the "work product" of a lawyer — likewise relates to a matter not raised in the Trial Court and totally inconsistent with the claim of general privilege.

If the government had desired to claim that any portion of the documents sought were privileged as the work product of a lawyer, that claim would have been presented through a motion made in accordance with Rule 30 (b) supported by a showing of "good cause" for privilege as required by the provisions of that rule which would have required a specific showing of the nature of the documents, rather than a mere oral statement or argument with regard thereto.

Not only did the government fail to present any such claim of privilege (by motion or otherwise), but had it done so there would have been an unescapable admission that the claim should be determined by the Court, and that the documents claimed to be privileged on that account should have been presented to the Court for its inspection (when so ordered) to permit determination of the claim.

The point is that the government refused to present anything for the inspection of the Court and made no claim of specific privilege in respect to any particular documents, since such a claim would have conceded the question to be one for judicial determination.

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